JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

Benefits for Consumers in the Revised Nursing Facility Regulations

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Justice in Aging is a national organization that uses the power of law to fight senior poverty by securing access to affordable health care, economic security, and the courts for older adults with limited resources.

Since 1972 we've focused our efforts primarily on populations that have traditionally lacked legal protection such as women, people of color, LGBT individuals, and people with limited English proficiency.

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- All on mute. Use Questions function for substantive questions and for technical concerns.
- Problems with getting on to the webinar? Send an e-mail to trainings@justiceinaging.org.
- Slides and a recording are available at Justice in Aging – Resources for Advocates – Webinars: http://www.justiceinaging.org/resources-for-advocates/webinars. See also the chat box for this web address.

Timeline

- Nursing Home Reform Law effective in October 1990.
- Original regulations released in September 1991.
- Newly revised regulations released on Oct. 4, 2016.
  - 81 Fed. Reg. 68,688 (Oct. 4, 2016).

Effective Dates

- Implemented in three phases:
  - Nov. 28, 2016 -- most regulations effective, particularly those that continue existing requirements.
  - Nov. 28, 2017 – additional regulations effective (including behavioral health); Surveyor's Manual includes new guidance; use of new survey process begins.
  - Nov. 28, 2019 – implementation of new programs such as Quality Assurance and Performance Improvement (QAPI), and Compliance and Ethics Programs.

Person-Centered Care

- "Person-centered care means to focus on the resident as the locus of control and support the resident in making their own choices and having control over their daily lives."
  - 42 C.F.R. §483.5.

Poll on Person-Centered Care

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Addressing Resident Preferences

- Resident has the "right to reside and receive services in the facility with reasonable accommodation of resident needs and preferences except when to do so would endanger the health or safety of the resident or other residents."
  - 42 C.F.R. §483.10(e)(3).

Initial Care Planning

- Baseline care plan required within 48 hours of admission.
- Must include at least:
  - Initial goals.
  - MD orders.
  - Dietary orders.
  - Therapy services.
  - Social services.
  - PASARR recommendation (if applicable).
    - 42 C.F.R. §483.21(a).
      - Implemented in Phase 2.

Comprehensive Care Plan

- Within 7 days of assessment.
- Interdisciplinary team includes, "[t]o the extent practicable, the participation of the resident and the resident's representative(s)."
  - An explanation must be included in a resident's medical record if "the participation of the resident and their resident representative is determined not practicable for the development of the resident's care plan."
    - 42 C.F.R. § 483.21(b).

Interdisciplinary Team

- Must also include:
  - Attending MD.
  - RN with responsibility for resident.
  - CNA with responsibility for resident.
  - Member of food and nutrition staff.
  - Other appropriate staff, based on resident's need or as requested by resident.
    - 42 C.F.R. § 483.21(b)(2)(ii)(F).

Care Plan Contents

- Services needed for resident's highest practicable well-being.
- Resident's goals and desired outcomes.
- Resident's preference and potential for future discharge.
- Discharge plans, as appropriate.
  - 42 C.F.R. § 483.21(b).

Discharge Planning

- Each resident must have discharge plan, which must be updated as needed.
- Resident and/or resident's representative must be involved.
- If discharge to community is determined to be not feasible, facility must document who made the determination and why.
  - 42 C.F.R. § 483.21(c).

Poll on Community Access

Access to Community

- "The resident has a right to interact with members of the community and participate in community activities both inside and outside the facility."
  - 42 C.F.R. § 483.10(f)(3).
    - Recognition in preamble that residents have varying abilities to participate in outside-facility activities.
      - 81 Fed. Reg. at 68,718-19.

Activities

- Based on the comprehensive assessment and care plan and the preferences of each resident;
- Both facility-sponsored group and individual activities and independent activities; and
- Encouraging both independence and interaction in the community.
  - 42 C.F.R. § 483.24(c).

Meals

- Menus must "[r]eflect, based on a facility's reasonable efforts, the religious, cultural, and ethnic needs of the resident population, as well as input received from residents and resident groups."
  - 42 C.F.R. § 483.60(c).

Eating Between Meals

- "Suitable, nourishing alternative meals and snacks must be provided to residents who want to eat at non-traditional times or outside of scheduled meal service times, consistent with the resident plan of care."
  - 42 C.F.R. § 483.60(f)(3).

Poll on Access to Food

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Communicating with Limited-English-Proficient Residents

- Must be able to communicate in resident's language re:
  - Informing resident of legal rights.
  - Resident rights and responsibilities.
  - Resident's "total health status."
  - Proposed involuntary transfer or discharge.
  - Binding arbitration agreements.
    - 42 C.F.R. §§ 483.10(c)(1), (g)(3), (4), (16)(i), 483.15(c)(3)(i), & 483.70(n)(2)(i)(A).

Cost Is No Excuse

- Commenters complained about cost in communicating with limited-English-proficient residents.
- CMS says: "Facilities should already have access to these services. Facilities are currently required to have the ability to communicate effectively, verbally and in writing, with residents."
  - 81 Fed. Reg. at 68,707.

Transfers within Facility

- Resident can refuse intra-facility transfer if the purpose is:
  - To move the resident out of a Medicare-certified room.
  - "Solely for the convenience of staff."
- Written notice, including reason for change, before change in room or roommate.
  - 42 C.F.R. § 483.10(e)(6), (7).

Visitors

- Resident has right to "immediate access" to visits by relatives or non-family visitors.
- Non-family visitation is "subject to reasonable clinical and safety restrictions."
  - 42 C.F.R. § 483.10(f)(4).
    - Does this strengthen visitation rights for family, by suggesting that family visits are not subject to restriction?
- Safety restrictions include locking the facility at night, prior arrangements for late-night access, restricting access if the visitor has exploited or coerced the resident, or denying access to a visitor who has committed criminal acts such as theft, or is inebriated and disruptive.
  - 81 Fed. Reg. at 68,716.

No Waivers of Rights

- Facility must "[n]ot request or require residents or potential residents to waive their rights as set forth in this subpart and in applicable state, federal or local licensing or certification laws, including but not limited to their rights to Medicare or Medicaid."
  - 42 C.F.R. § 483.15(a)(2)(i).

Lost Property

- Facility cannot "request or require residents or potential residents to waive potential facility liability for losses of personal property."
  - 42 C.F.R. § 483.15(a)(2)(iii).

Lost Dentures

- Facility "[m]ust have a policy identifying those circumstances when the loss or damage of dentures is the facility's responsibility and may not charge a resident for the loss or damage of dentures determined in accordance with facility policy to be the facility's responsibility."
  - 42 C.F.R. § 483.55.
    - Implemented in Phase 2.

Admission: No Pre-Dispute Arbitration Agreements

- Not allowed because arbitration has negative impact on quality of care.
- Post-dispute arbitration OK.
  - 42 C.F.R. § 483.70(n).

- This provision is currently enjoined by AHCA legal challenge.
  - AHCA v. Burwell, Civ. No. 3:16-CV-00233 (N.D. Miss. 2016).

No Financial Guarantees

- Facility cannot require or request third-party financial guarantee.
  - Does not address situations where agent takes on responsibility re: resident's money and Medicaid application.
    - CMS says they will "further investigate this concern."
      - 42 C.F.R. § 483.15(a)(3); 81 Fed. Reg. at 68,732.

More Enforcement on Admission Agreements

- "The terms of an admission contract … must not conflict with the requirements of these regulations."
  - This is a positive step – admission agreements often conflict with relevant law.

Grievances

- Resident has right to voice grievances to facility or relevant agencies regarding care and other concerns.
- Facility must have Grievance Official to oversee the process, lead any necessary investigations, and issue written grievance decisions.
  - 42 C.F.R. § 483.10(j).

Grievance Decisions

- Decisions must include:
  - Steps taken to investigate;
  - Summary of findings or conclusions;
  - Statement as to whether grievance was confirmed; and
  - Any corrective action taken or to be taken.
    - 42 C.F.R. § 483.10(j).

Justifications for Involuntary Transfer/Discharge

- Same as before, but with some changes in wording.
  - "Safety of others" justification now limited to endangerment from resident's "clinical or behavioral status."
  - Nonpayment does not occur if resident has submitted necessary paperwork for third-party reimbursement.
    - 42 C.F.R. § 483.15(c).

Focus on Claims that Facility Cannot Meet Resident's Needs

- Specific documentation required if transfer/discharge based on inability to meet needs.
  - Record must include
    - "Specific resident need(s) that cannot be met";
    - "Facility attempts to meet the resident needs"; and
    - "Service available at the receiving facility to meet the need(s)."
      - These requirements implemented in Phase 2.
  - Also note pre-admission requirement that facility provide "notice of special characteristics or service limitations."

Some New Protections

- No transfer/discharge while appeal is pending, absent documented endangerment to health or safety of resident or others.
- Facility must send copy of transfer/discharge notice to LTC ombudsman program.
  - Resident consent not required. 81 Fed. Reg. at 68,734.
- Facility must assist resident in "completing the form and submitting the appeal hearing request.

Returning to Facility

- Facility must give notice of bed-hold policy.

- Facility also must allow return to next available room.
  - Must be previous room, if available.
    - 42 C.F.R. § 483.15(e)(1).

Preventing Resident Dumping

- If facility determines "resident cannot return to the facility," facility must comply with transfer/discharge regulations "as they apply to discharges."
  - This is cross-reference to section that requires notice "before a facility transfers or discharges a resident."
  - CMS states that revisions "better address concerns that [originally proposed language] would allow patient dumping." 81 Fed. Reg. at 68,735.

Questions?

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